

No. 11034

United States
Circuit Court of Appeals
For the Ninth Circuit.

A. N. McDONALD,

Appellant,

vs.

CHESTER BOWLES, Administrator, Office of
Price Administration,

Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States
for the Northern District of California,
Southern Division

FILED

JUN - 6 1945

PAUL P. O'BRIEN,
CLERK



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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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In the District Court of the United States
Northern District of California
Southern Division

No. 22746G

PRENTISS M. BROWN, Administrator, Office of
Price Administrator,

Plaintiff,

vs.

A. N. McDONALD and W. O. FINKE, individ-
ually and as co-partners, doing business under
the firm name of McDONALD & FINKE,
Defendants.

COMPLAINT FOR INJUNCTION AND
TREBLE DAMAGES

COUNT ONE

1. In the judgment of the Price Administrator, the defendants have engaged in actions and practices which constitute violations of Section 4(a) of the Emergency Price Control Act of 1942, (Pub. Law 421, 77th Cong., 2nd Sess., c. 56, 56 Stat. 23, 50 U.S.C.A., Appx. 212), hereinafter called "the Act," in that they violated Revised Maximum Price Regulation No. 169, as amended—Beef and Veal Carcasses and Wholesale Cuts; Revised Maximum Price Regulation No. 239, as amended—Lamb and Mutton Carcasses, and cuts at wholesale and retail; Revised Maximum Price [1*] Regulation No. 148, as amended—Dressed Hogs and Wholesale

*Page numbering appearing at foot of page of original certified Transcript of Record.

Pork Cuts; Maximum Price Regulation No. 389, as amended—Ceiling Prices for Certain Sausage Items at Wholesale, and Maximum Price Regulation No. 398—Variety Meats and Edible By-Products at Wholesale, all of which price regulations were effective in accordance with the provisions of said Act; and, therefore, pursuant to Section 205(a) of the Act, the Price Administrator brings this action to enforce compliance with said Section 4(a).

2. Jurisdiction of this action is conferred upon the Court by Section 205(c) of the Act.

3. At all times mentioned herein there has been in effect, pursuant to said Act, Revised Maximum Price Regulation No. 169, as amended (7 Fed. Reg. 10381), establishing maximum prices for beef and veal carcasses, wholesale and fabricated cuts, and processed products.

4. Since the 1st day of June, 1943, defendants sold at wholesale and delivered beef and veal carcasses, wholesale cuts, fabricated cuts and ground meat at prices in excess of those established by said Revised Maximum Price Regulation No. 169, as amended.

COUNT TWO

1. The allegations of paragraphs 1 and 2 of Count One herein are incorporated by reference as if fully set forth.

2. At all times mentioned herein there has been in effect, pursuant to said Act, Revised Maximum Price Regulation No. 239, as amended—Lamb and

Mutton Carcasses, and Cuts at Wholesale and Retail (7 Fed. Reg. 10688), establishing maximum prices of lamb and mutton carcasses, wholesale cuts and hotel supply cuts.

3. Since the 1st day of June, 1943, defendants sold at wholesale and delivered lamb and mutton carcasses, lamb and [2] mutton wholesale cuts, and lamb and mutton hotel supply cuts, at prices in excess of those established by Revised Maximum Price Regulation No. 239, as amended.

COUNT THREE

1. The allegations of Paragraphs 1 and 2 of Count One herein are incorporated by reference as if fully set forth.

2. At all times herein mentioned there has been in effect, pursuant to said Act, Revised Maximum Price Regulation No. 148, as amended (7 Fed. Reg. 8609)—Dressed Hogs and Wholesale Pork Cuts, establishing maximum prices of dressed hogs and wholesale pork cuts.

3. Since the 1st day of June, 1943, defendants sold at wholesale and delivered wholesale pork cuts at prices in excess of those established by said Revised Maximum Price Regulation No. 148, as amended.

COUNT FOUR

1. The allegations of Paragraphs 1 and 2 of Count One herein are incorporated by reference as if fully set forth.

2. At all times herein mentioned there has been

in effect, pursuant to said Act, Maximum Price Regulation No. 389, as amended—Ceiling prices for Certain Sausage Items at Wholesale, establishing maximum prices for pork or breakfast sausages, frankfurters and bologna. (8 Fed. Reg. 5903.)

3. Since the 1st day of June, 1943, defendants sold at wholesale and delivered pork or breakfast sausages, frankfurters and bologna, at prices in excess of those established by Maximum Price Regulation No. 389, as amended.

COUNT FIVE

1. The allegations of Paragraphs 1 and 2 of Count One herein are incorporated by reference as if fully set forth. [3]

2. At all times herein mentioned there has been in effect, pursuant to said Act, Maximum Price Regulation No. 398—Variety Meats and Edible By-Products at Wholesale (8 Fed. Reg. ———), effective June 1, 1943, establishing maximum prices of Fresh and Processed variety meats and edible by-products derived from hog, cattle, calf, sheep and lamb slaughter.

3. Since the 1st day of June, 1943, defendants sold at wholesale and delivered fresh variety meats and edible by-products, derived from hog, cattle, calf, sheep and lamb slaughter, at prices in excess of those established by Maximum Price Regulation No. 398.

COUNT SIX

1. The allegations of Paragraphs 1, 2 and 3 of Count One herein are incorporated by reference as if fully set forth.

2. During all times herein mentioned, Section 1364.407 (e) (2) of Revised Maximum Price Regulation No. 169, as amended, has provided that on or before June 15, 1943, each separate selling establishment making sales to purveyors of meals, pursuant to the provisions of Paragraph (o) of Section 1364.452 or Paragraph (n) of Section 1364.467 of said Regulation, shall file with the nearest District or State Office of the Office of Price Administration a statement showing:

“1. The total volume by weight, of all meats (fresh, frozen, cured, smoked, cooked, dried, canned, or otherwise processed), variety meats and edible by-products, sold and delivered by such selling establishment from September 15, 1942, through December 15, 1942, other than sales to war procurement agencies, and

“2. The total volume, by weight, of all kinds (eg., lamb, mutton, pork, beef, veal, sausage, ham-[4] burger, etc.) of meat, variety meats, (e.g., liver, tongue, kidney, etc.), and edible by-products, and all other processed meat items not specifically set forth herein, sold and delivered by such selling establishment, during such period, to purveyors of meals, other than war procurement agencies.”

3. At all times herein mentioned, defendants made sales of meat to purveyors of meals, pursuant to the provisions of Paragraph (o) of Section

1364.452 and Paragraph (n) of Section 1364.467 of said Regulation, but failed to file on or before June 15, 1943, with the Office of Price Administration the statement set forth in said Paragraph 1364.407(e) (2) of said Regulation.

4. At all times herein mentioned, Section 1364.407(e) (1) has provided, in substance, that every separate selling establishment making sales to purveyors of meals shall keep for inspection by the Office of Price Administration for so long as the Emergency Price Control Act of 1942, as amended, is in effect, a complete and accurate record in schedule form for each calendar month, commencing with January, 1943, with respect to beef, and June 1, 1943, with respect to veal, showing separately:

“1. The total inventory in pounds at the beginning of each month of each grade of each beef carcass, beef wholesale cut, fabricated beef cut, beef offal item and beef by-product (bones, fat, tallow, waste, etc.); veal carcass, veal wholesale cut, fabricated veal cut, veal offal item and veal by-product (bones, fat, tallow, waste, etc.); the total additions to inventory in pounds during the month for each grade of each [5] such item; and the total inventory in pounds at the end of each month for each grade of each such item;

“2. The total sales in pounds during the month of each grade of beef carcass, beef wholesale cut, fabricated cut, beef offal item, and beef by-product (bones, fat, tallow, waste, etc.); veal carcass, veal wholesale cut, fabricated veal cut, veal offal item,

and veal by-product (bones, fat, tallow, waste, etc.), showing separately the sales in pounds of each grade of each item made to purveyors of meals, war procurement agencies and other government agencies and the sales in pounds made to other buyers;

“3. The total sales realization for each item separately enumerated in (2) hereof (all sales of kosher meat shall be shown separately.)”

5. At all times mentioned herein, defendants made sales of beef and veal carcasses, wholesale cuts, fabricated cuts and processed products, to purveyors of meals and failed to make and keep for inspection by the Office of Price Administration complete and accurate records showing the data required to be kept by said Section 1364.407 (e) (1) of said Regulation.

6. At all times herein mentioned Section 1364.407(f) of Revised Maximum Price Regulation No. 169, as amended, provided as follows:

“Every person making a sale of any beef carcass, beef wholesale cut, veal carcass, veal wholesale cut, processed product or other meat item, subject to this Revised Regulation, shall furnish to the purchaser at the time of delivery a written statement setting forth the name and address of the buyer and seller; identifying each such item sold; and setting forth the quantity, the grade, including sex identification as to [6] cow, stag, bull, and the weight thereof, and the price charged and received therefor, including a separate statement

of the transportation and local delivery charge, as required by Section 1364.454(a)(6).

7. At all times herein mentioned, defendants made wholesale sales of said meat items described in paragraph 6 hereof and failed to furnish to the purchasers of said meat items at the time of delivery, a written statement setting forth the data required by Section 1364.407(f) of said Regulation.

COUNT SEVEN

1. Plaintiff, as administrator, Office of Price Administration, brings this action for treble damages on behalf of the United States, pursuant to the provisions of Section 205(e) of the Emergency Price Control Act of 1942 (Pub. Law 421, 77th Cong. 2d Sess., c. 26, 56 Stat. 23), enacted January 30, 1942, hereinafter called "the Act."

2. Jurisdiction of this Count is conferred upon this Court by Sections 205(c) and 205(e) of the Act.

3. At all times herein mentioned there has been in full force and effect, pursuant to the Act, Revised Maximum Price Regulations No. 169, 239 and 148, all as amended, Maximum Price Regulation No. 389, as amended, and Maximum Price Regulation No. 398.

4. Between the 1st day of June, 1943, and the 3rd day of July, 1943, defendants sold at wholesale, and delivered, beef and veal carcasses, wholesale cuts, fabricated cuts, ground meat and processed products, at prices in excess of those established

by Revised Maximum Price Regulation No. 169, as amended. [7]

Between the 1st day of June, 1943, and the 3rd day of July, 1943, defendants sold at wholesale, and delivered lamb and mutton carcasses, wholesale cuts and hotel supply cuts, at prices in excess of the maximum prices established by Revised Maximum Price Regulation No. 239, as amended.

Between the 1st day of June, 1943, and the 3rd day of July, 1943, defendants sold at wholesale, and delivered, wholesale pork cuts at prices exceeding the maximum prices established by Revised Maximum Price Regulation No. 148, as amended.

Between the 1st day of June, 1943, and the 3rd day of July, 1943, defendants sold at wholesale, and delivered certain sausage items at prices exceeding the maximum prices established by Maximum Price Regulation No. 389, as amended.

Between the 1st day of June, 1943, and the 3rd day of July, 1943, defendants sold at wholesale, and delivered, fresh variety meats and edible by-products derived from hog, cattle, calf, sheep and lamb slaughter, at prices exceeding the maximum prices established by Maximum Price Regulation No. 398.

5. Said transactions referred to in Paragraph 4 of this Count occurred more than six months after the date of approval and enactment of the Act. None of said purchases was made for use or consumption other than in the course of trade or business.

6. Three times the aggregate amount by which the prices received by the defendants in the transactions referred to in Paragraph 4 of this Count

exceed the maximum prices provided by said Regulations equals \$12,804.66.

Wherefore, the Administrator demands:

1. A preliminary and final injunction enjoining the [8] defendants, their officers, agents, servants, employees and attorneys, and all persons in active concert or participation with the defendants, from:

Directly or indirectly selling, delivering, or offering for sale or delivery, any beef, veal lamb, mutton, or pork carcasses, wholesale cuts, fabricated cuts, hotel supply cuts, processed products, ground meat, pork or breakfast sausages, frankfurters, bologna, or fresh variety meats and edible by-products derived from hog, cattle, calf, sheep and lamb slaughter, at prices in excess of those established by Revised Maximum Price Regulations No. 169, 239 and 148, all as amended; Maximum Price Regulation No. 389, as amended, and Maximum Price Regulation No. 398, or otherwise violating, or attempting or agreeing to do anything in violation of said Regulations, or in violation of any Regulation or Order adopted pursuant to the Emergency Price Control Act of 1942 establishing maximum prices for any of said meat items.

2. A preliminary and final injunction requiring and directing the defendants, their officers, agents, servants, employees and attorneys, and all persons in active concert or participation with the defendants, to:

File with the Office of Price Administration a statement setting forth the data required by Section 1364.407(e) of Revised Maximum Price Regulation No. 169, as amended,

and

Make and keep for inspection by the Office of Price Administration, complete and accurate [9] records showing the data required by Section 1364.407(e)(1) of said Regulation,

and

To furnish to the purchasers of meat items from said defendants, a written statement at the time of delivery, setting forth the data required by Section 1364.407(f) of said Revised Maximum Price Regulation No. 169.

3. An appropriate temporary restraining order restraining, until the determination of the Price Administrator's motion for a preliminary injunction herein, the defendants, their officers, agents, servants, employees and attorneys, and all persons in active concert or participation with the defendants, from:

Engaging in the acts and practices set forth in Demand 1 above; and

a temporary mandatory order requiring said persons to:

Do all the acts specified in Demand 2 above.

4. Judgment on behalf of the United States against defendants in the sum of \$12,804.66.

5. Such other further and different relief as to the Court may seem just and proper in the premises.

Dated at San Francisco, California, August 23rd, 1943.

JOSEPH F. RANKIN
GEORGE MONCHARSH
THOS. C. RYAN

Attorneys for Plaintiff

[Endorsed]: Filed Aug. 23, 1943. [10]

[Title of District Court and Cause.]

MOTION FOR MORE DEFINITE AND
CERTAIN COMPLAINT

The defendant, A. N. McDonald, moves the court to require the plaintiff to furnish him with a more definite and certain complaint herein so that:

Each count of the complaint may show the time, quality, quantity, purchaser, price paid, alleged maximum price, and particular alleged regulation violated as to any sale charged against this defendant,

To the end that this defendant may properly and intelligently prepare a responsive pleading herein.

CHARLES REAGH,

Attorney for A. N. McDonald.

(Acknowledgment of Receipt of Copy)

[Endorsed]: Filed Sep. 23, 1943. [11]

[Title of District Court and Cause.]

ANSWER OF DEFENDANT A. N. McDONALD

For answer said defendant says:

First Defense.

The complaint fails to state a claim against this defendant upon which relief can be granted.

Second Defense.

This defendant admits the allegations contained in paragraph 2 of the first count of the complaint, alleges that he is without knowledge or information sufficient to form a belief as to the allegations of paragraph 1 of the first count of the complaint; and denies each and every other allegation contained in the complaint.

CHARLES REAGH

Attorney for A. N. McDonald

Service admitted overleaf.

(Acknowledgment of Receipt of Service)

[Endorsed]: Filed Oct. 25, 1943. [12]

[Title of District Court and Cause.]

DEMAND FOR JURY TRIAL

Defendant A. N. McDonald demands trial by jury as to all issues herein.

CHARLES REAGH

Attorney for A. N. McDonald

Received a copy of the within Demand for Jury Trial, this 25th day of October, 1943.

THOS. C. RYAN

Attorney for Plaintiff

CHARLES REAGH

Attorney for W. O. Finke

[Endorsed]: Filed Oct. 25, 1943. [13]

[Title of District Court and Cause.]

PRE-TRIAL ORDER

This cause came on for pre-trial conference before the Honorable Louis E. Goodman, District Judge, on Monday, April 3, 1944, W. H. Brunner, Esq., appearing as attorney for the plaintiff, and Charles Reagh, Esq., appearing as attorney for defendants.

Based upon proceedings at said pre-trial conference It Is Ordered As Follows:

1. The defendant W. O. Finke is not now a partner of the defendant A. N. McDonald, nor was he such a partner during any of the times mentioned in the complaint in the above entitled action. That said W. O. Finke was and now is only an employee of said A. N. McDonald and has no interest whatever in the wholesale and retail business conducted by said A. N. McDonald [14] in the City of Oakland, County of Alameda, State of California, under the firm name and style of McDonald's Market. That for the foregoing reason this action be and the same is hereby dismissed as to the defendant W. O. Finke.

2. That defendant A. N. McDonald operates a

meat market at 493-497 Ninth Street, in the City of Oakland, County of Alameda, State of California, from which he sells meat primarily at wholesale to purveyors of meals and to retailers, and incidentally at retail to ultimate consumers who buy for home consumption and use. That at no time covered by the complaint on file in this action did defendant make sales at retail to ultimate consumers amounting to more than 15 per cent of his total monthly business.

3. That plaintiff deliver to defendant or his counsel for critical examination the transcript prepared by investigators of the Office of Price Administration from the invoices and records of said defendant A. N. McDonald for the period of June 1, 1943, to July 3, 1943 inclusive, which transcript shows not only the facts appearing upon the face of said invoices but also a listing of the proper ceiling price applicable to each sale and the determination of the overcharge alleged with reference to each sale. That defendant, after such critical examination of said transcript, indicate in writing to plaintiff by specifications of objection the particulars wherein he claims that such transcript does not state the true facts applying to each sale, or the proper maximum price at which each sale exceeds the maximum lawful price which defendant could have charged in making such sale. That if no objection be made or specifications of objection be furnished by defendant as hereinabove permitted, it be considered by this Court for the purposes of this action [15] that each item set forth in said tran-

script is true, accurate and correct as to the description of said item sold, the price charged, the applicable lawful maximum price, and the amount of overcharge, if any. That if objection be made and specifications of objection be furnished by defendant, and not be reconciled by agreement between the parties hereto, the issues so joined by such objection and specifications of objection be tendered for determination at the trial of said action.

4. That issues in said action be limited as hereinabove set forth and as so limited that this Pre-Trial Order and the objections and specifications of objection as permitted hereunder be considered a complete statement of all matters in dispute between the parties to this action. That this Pre-Trial Order shall not be amended except with the consent of the parties or at the discretion of the Court to prevent manifest injustice in accordance with Rule 16 of the Federal Rules of Civil Procedure.

Dated this 11th day of April, 1944.

LOUIS E. GOODMAN

United States District Judge

Receipt of a copy of the within Pre-Trial Order is hereby admitted this 8th day of April, 1944.

CHARLES REAGH

Attorney for Defendant.

Please note defendant's exception

CHARLES REAGH

Attorney for A. N. McDonald

[Endorsed]: Filed Apr. 11, 1944. [16]

[Title of District Court and Cause.]

VERDICT

We, the Jury, find in favor of the Plaintiff and assess the damages against the Defendant in the sum of four thousand six hundred thirty-four dollars and seven cents (\$4634.07/100) Dollars.

GRACE McCANN MORLEY
Foreman.

[Endorsed]: Filed August 23, 1944. [17]

[Title of District Court and Cause.]

DEFENDANT'S MOTION FOR JUDGMENT
NON OBSTANTE VERDICTO

The defendant respectfully moves the court to have the verdict and any judgment entered thereon in this case set aside and to have judgment entered for defendant in accordance with the motion for a directed verdict made at the close of the plaintiff's evidence and renewed at the close of all the evidence in this case. The grounds of such motion are that there is a total failure of proof in this case and no evidence upon which a verdict in favor of plaintiff and against defendant can be legally based, in the particulars set forth at the time of making such motions.

Dated: San Francisco, California, August 31st,
A. D. 1944.

CHARLES REAGH
Attorney for Defendant

Receipt of copy of the above motion acknowledged this 31st day of August, A. D. 1944.

THOMAS C. RYAN

W. H. BRUNNER

Attorneys for Plaintiff

[Endorsed]: Filed Aug. 31, 1944. [18]

In the Southern Division of the United States District Court for the Northern District of California

No. 22746-G

CHESTER BOWLES, Administrator, Office of Price Administration,

Plaintiff,

vs.

A. N. McDONALD, etc.,

Defendant.

JUDGMENT ON VERDICT

This cause having come on regularly for trial on August 22, 1944, being a day in the July 1944 Term of said Court, before the Court and a Jury of twelve persons duly impaneled and sworn to try the issues joined herein; W. H. Brunner, Esq. appearing at attorney for the plaintiff, and Charles Reagh, Esq. appearing at attorney for the defendant, and the trial having been proceeded with on the 22nd and 23rd days of August in said year and term, and

oral and documentary evidence on behalf of the respective parties having been introduced and closed, and the cause, after arguments by the attorneys and the instructions of the Court, having been submitted to the Jury and the Jury having subsequently rendered the following verdict, which was ordered recorded, viz: "We, the Jury, find in favor of the Plaintiff and assess the damages against the Defendant in the sum of four thousand six hundred thirty-four dollars and seven cents (\$4634.07). Grace McCann Morley, Foreman," and the Court having ordered that judgment be entered herein in accordance with said verdict and for costs; [19]

Now, therefore, by virtue of the law and by reason of the premises aforesaid, it is considered by the Court that said plaintiff do have and recover of and from said defendant the sum of Four Thousand Six Hundred Thirty-four and 07/100 Dollars (\$4,634.07), together with his costs herein expended taxed at \$.

Judgment entered this 5th day of September, 1944.

C. W. CALBREATH,
Clerk

[Endorsed]: Filed Sep. 5, 1944. [20]

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS
OF LAW

The above entitled action came on regularly for trial on the 22nd and 23rd days of August, 1944 before the Honorable Louis E. Goodman, Judge of the United States District Court, on the issue of an injunction, and before a jury on the issue of treble damages.

Plaintiff was represented by W. H. Brunner, Esq. and defendant by Charles Reagh, Esq. Evidence both oral and documentary was offered on behalf of both parties, and the issue of an injunction having been submitted to the Court, the Court hereby finds as follows:

FINDINGS OF FACT

1. That all the matters, facts and things alleged and set forth in Counts One, Two, Three, Four and Five of plaintiff's [21] complaint are and each of them is true.

2. As to Count Six of plaintiff's complaint, the Court finds:

(a) That there was no evidence to prove the allegations of Paragraphs 2, 3 and 4 of said Count Six.

(b) That all the matters, facts and things alleged and set forth in Paragraphs 1, 5, 6 and 7 of said Count Six are and each of them is true.

CONCLUSION OF LAW

As conclusions of law from the foregoing findings of fact, the Court concludes that plaintiff is entitled to a permanent injunction enjoining the defendant, his officers, agents, servants, employees and attorneys, and all persons in active concert or participation with him, from:

Directly or indirectly selling, delivering or offering for sale or delivery, any beef, veal, lamb, mutton, or pork carcasses, wholesale cuts, fabricated cuts, hotel supply cuts, processed products, ground meat, pork or breakfast sausages, frankfurters, bologna, or fresh variety meats and edible by-products derived from hog, cattle, calf, sheep and lamb slaughter, at prices in excess of those established by Revised Maximum Price Regulations No. 169, 239 and 148, all as amended; Maximum Price Regulation No. 389, as amended, and Maximum Price Regulation No. 398, or otherwise violating, or attempting or agreeing to do anything in violation of said Regulations, or in violation of any Regulation or Order adopted pursuant to the [22] Emergency Price Control Act of 1942, as amended, establishing maximum prices for any of said meat items.

2. A permanent injunction requiring and directing the defendant, his officers, agents, servants, employees and attorneys, and all persons in active concert or participation with the defendant, to:

Make and keep for inspection by the Office of Price Administration, complete and accurate records showing the data required by Section 1364.-407(e)(1) of said Regulation.

and

To furnish to the purchasers of meat items from said defendants, a written statement at the time of delivery, setting forth the data required by Section 1364.407(f) of said Revised Maximum Price Regulation No. 169.

3. That plaintiff have judgment for costs. Let judgment be entered accordingly.

Dated: September 8th, 1944.

LOUIS E. GOODMAN

Judge of the United States
District Court.

Receipt of a copy of the within Finding of Fact and Conclusions of Law is hereby acknowledged this 2nd day of Sept., 1944.

CHARLES REAGH

Attorney for Defendant.

[Endorsed]: Filed Sep. 8, 1944. [23]

In the District Court of the United States, Northern
District of California, Southern Division

No. 22746-G

CHESTER BOWLES, Administrator, Office of
Price Administration,

Plaintiff,

vs.

A. N. McDONALD,

Defendant.

JUDGMENT FOR PERMANENT
INJUNCTION

The above entitled action came on regularly for trial on the 22nd and 23rd days of August, 1944 before the Honorable Louis E. Goodman, Judge of the United States District Court, on the issue of an injunction, and before a jury on the issue of treble damages.

Plaintiff was represented by W. H. Brunner, Esq. and defendant by Charles Reagh, Esq. Evidence both oral and documentary was offered on behalf of both parties, and the Court having filed herein its Findings of Fact and Conclusions of Law, it is hereby

Ordered, Adjudged and Decreed:

1. That plaintiff is entitled to a permanent injunction enjoining the defendant, his officers, agents, servants, [24] employees and attorneys, and all persons in active concert or participation with him, from:

Directly or indirectly selling, delivering, or offering for sale or delivery, any beef, veal, lamb, mutton, or pork carcasses, wholesale cuts, fabricated cuts, hotel supply cuts, processed products, ground meat, pork or breakfast sausages, frankfurters, bologna, or fresh variety meats and edible by-products derived from hog, cattle, calf, sheep and lamb slaughter, at prices in excess of those established by Revised Maximum Price Regulations Nos. 169, 239 and 148, all as amended; Maximum Price Regulation No. 389, as amended, and Maximum Price Regulation No. 398, or otherwise violating, or attempting or agreeing to do anything in violation of said regulations, or in violation of any regulation or order adopted pursuant to the Emergency Price Control Act of 1942, as amended, establishing maximum prices for any of said meat items.

2. That the defendant, his officers, agents, servants, employees and attorneys, and all persons in active concert or participation with the defendant, are permanently required and directed to:

Make and keep for inspection by the Office of Price Administration, complete and accurate records showing the data required by Section 1364.407(e)(1) of Revised Maximum Price Regulation No. 169, as amended, and

To furnish to the purchasers of meat items [25] from said defendants, a written statement at the time of delivery, setting forth the data required by Section 1364.407(f) of said Regulation.

3. That plaintiff have judgment against the defendant for his costs.

Dated: Sept. 8th, 1944.

LOUIS E. GOODMAN

Judge of the United States
District Court

[Endorsed]: Filed Sep. 8, 1944. [26]

[Title of District Court and Cause.]

DEFENDANT'S MOTION FOR NEW TRIAL

Defendant moves the court to set aside the verdict and judgment herein and grant a new trial of this case because:

1. The verdict is against the evidence, in that there was no competent evidence to support it.
2. The verdict is against the law.
3. At the trial the court erred in matters of law, that is to say: [27]

(a) In admitting evidence against the objection of defendant, particularly in admitting in evidence Exhibit No. 1, offered by the plaintiff

(b) In over-ruling the defendant's motion for a directed verdict at the close of the plaintiff's case and his like motion at the close of all the evidence

(c) In instructing the jury in that the charge as a whole was misleading and in particular was erroneous in those matters to which specific exceptions were taken by defendant at the close of the charge.

(d) In refusing the instructions requested by the defendant

4. Because by the pre-trial order herein, the defendant was prevented from having a fair trial in that thereby he was required to furnish evidence which might be made the basis of a criminal charge against him, or to admit facts which might expose him to a penalty or forfeiture, the defendant now again claiming that said pre-trial order was and is an infringement of his right against self incrimination.

5. The judgment is erroneous in all the particulars above claimed to be erroneous in the verdict.

Dated: September 15th, 1944.

CHARLES REAGH

Attorney for Defendant

Received a copy of the above and foregoing Motion for New Trial, this 15th day of September, 1944.

THOMAS C. RYAN

W. H. BRUNNER

Attorneys for Plaintiff

[Endorsed]: Filed Sep. 15, 1944. [28]

[Title of District Court and Cause.]

NOTICE OF APPEAL

To C. W. Calbreath, Esq., Clerk of said United States District Court, please take notice:

That the above named A. N. McDonald hereby appeals from the final judgment of this Court, entered of record on the 5th day of September, 1944, to the United States Circuit Court of Appeals for the 9th Circuit.

Dated: December 15th, 1944.

CHARLES REAGH

Attorney for Defendant

[Endorsed]: Filed Dec. 15, 1944. [29]

[Title of District Court and Cause.]

DESIGNATION OF CONTENTS OF RECORD ON APPEAL

Appellant, A. N. McDonald, designates the following portion of the record, proceedings and evidence in this cause to be contained in the record on appeal, to-wit:

1. All the documents contained in the files of the clerk of this court.
2. All the evidence and proceedings, including instructions and exceptions thereto, at the trial of this cause. [30]
3. All the exhibits received in evidence at the trial of said cause.

It is the intention of the appellant on this appeal to rely upon the complete record and all the proceedings and evidence in this action.

Dated: December 15th, 1944.

CHARLES REAGH

Attorney for Defendant

Receipt of a copy of the above and foregoing Designation of Contents of Record on Appeal is hereby acknowledged this 15th day of December, 1944.

W. H. BRUNNER

PHILIP ADAMS

Attorneys for Plaintiff

[Endorsed]: Filed Dec. 15, 1944. [31]

[Title of District Court and Cause.]

ORDER EXTENDING TIME TO DOCKET

Good cause appearing therefor, it is hereby Ordered that the Appellant may have to and including March 5, 1945, to file the Record on Appeal in the United States Circuit Court of Appeals in and for the Ninth Circuit.

Dated: January 24, 1945.

A. F. ST. SURE

United States District Judge.

[Endorsed]: Filed Jan. 24, 1945. [32]

[Title of District Court and Cause.]

ORDER EXTENDING TIME TO DOCKET

Good cause being shown, the time of the appellant dered that the Appellant herein may have to and including March 15, 1945, to file the Record on Appeal in the United States Circuit Court of Appeal in and for the Ninth Circuit.

Dated: March 5, 1945.

LOUIS E. GOODMAN

United States District Judge.

[Endorsed]: Filed Mar. 5, 1945. [33]

In the Circuit Court of Appeals of the United
States for the Ninth Circuit

CHESTER BOWLES, as Administrator, etc.,
Plaintiff and Appellee,

v.

A. N. McDONALD, et al,

Defendants,

A. N. McDONALD,

Appellant.

ORDER ENLARGING TIME TO LODGE
RECORD

Good cause being shown, the time of the apellant herein to file in this court the transcript of record on appeal is hereby enlarged to and including the 14th day of April, 1945.

Dated: March 15th, 1945.

FRANCIS A. GARRECHT

Circuit Judge

[Endorsed]: Filed Mar. 15, 1945. Paul P. O'Brien, Clerk.

[Endorsed]: Filed Mar. 15, 1945. C. W. Calbreath, Clerk. [34]

In the District Court of the United States for
the Northern District of California, Southern
Division.

No. 22746-G

CHESTER BOWLES, Administrator, Office of
Price Administration,

Plaintiff,

v.

A. N. McDONALD,

Defendant.

ORDER THAT CERTAIN DOCUMENTS BE
ATTACHED TO RECORD AND TRAN-
SCRIPT ON APPEAL AND ORIGINALS
TRANSMITTED

On the motion of Charles Reagh, Esq., in open
court, good cause appearing, it is

Ordered: That in preparing the record on appeal
herein, the Clerk of this Court attach thereto the
original of the Reporter's Transcript of the oral
proceedings and also Exhibit No. 1.

Dated: March 19th, 1945.

LOUIS E. GOODMAN

District Judge

[Endorsed]: Filed Mar. 19, 1945. [35]

District Court of the United States,
Northern District of California

CERTIFICATE OF CLERK TO TRANSCRIPT
OF RECORD ON APPEAL

I, C. W. Calbreath, Clerk of the District Court of the United States, for the Northern District of California, do hereby certify that the foregoing 35 pages, numbered from 1 to 35, inclusive, contain a full, true, and correct transcript of the records and proceedings in the case of Prentiss M. Brown, Administrator, Office of Price Administrator, Plaintiff, vs. A. N. McDonald and W. O. Finke, individually and as co-partners, doing business under the firm name of McDonald & Finke, Defendants, No. 22746 G, as the same now remain on file and of record in my office.

I further certify that the cost of preparing and certifying the foregoing transcript of record on appeal is the sum of \$10.85 and that the said amount has been paid to me by the Attorney for the appellant herein.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court at

San Francisco, California, this 2nd day of April,
A. D. 1945.

[Seal]

C. W. CALBREATH,

Clerk

M. E. VAN BUREN

Deputy Clerk [36]

In the Southern Division of the United States
District Court, in and for the Northern Dis-
trict of California.

No. 22746-G

Before: Hon. Louis E. Goodman,
Judge.

CHESTER BOWLES, Administrator, Office Price
Administration,

Plaintiff,

v.

A. N. McDONALD and W. O. FINKE, individu-
ally and as copartners doing business under
the name of McDONALD & FINKE,

Defendants.

Tuesday, August 22, 1944

Counsel Appearing:

W. H. Brunner, Esq.,
For Plaintiff

Charles Reagh, Esq.,
For Defendants

(A jury having been impaneled and opening

statements made by counsel for plaintiff and defendants and following proceedings were had:) [1*]

OLLIS W. NEWMAN,

called for the plaintiff; sworn.

The Clerk: Will you state your name to the Court and jury, please.

A. Ollis W. Newman.

Mr. Brunner: Q. What is your business or occupation, Mr. Newman?

A. I am with Safeway Stores.

Q. How long have you been with Safeway Stores? A. Just a year.

Q. Where were you employed prior to the time that you worked for the Safeway Stores?

A. Office of Price Administration.

Q. In what capacity A. Investigator.

Q. I will ask you, Mr. Newman, whether in your capacity as investigator of the Office of Price Administration, you had occasion to examine the records of Mr. McDonald, or what was then known as McDonald & Finke? A. I did.

Q. What records did you examine?

A. As near as we could determine, all of the available sales for the month of June.

Q. What year? A. 1943.

Q. What, if anything, did you do with reference to the sales records in the way of transcribing them onto a record for the purpose of investigation?

*Page numbering appearing at top of page of original Reporter's Transcript.

(Testimony of Ollis W. Newman.)

A. We received a copy of the sales record——

Q. From where?

A. From the bookkeeper of McDonald & Finke, as it was then called, and gave a receipt for them and brought them to the office and made, as near as possible, an absolute transcription. [2]

Q. I show you here, Mr. Newman, a document of many pages, 158 pages, and I ask you if these yellow sheets are the transcript you made.

A. They are.

The Court: That is Plaintiff's Exhibit 1 for identification.

(The document was marked Plaintiff's Exhibit 1 for identification.)

Mr. Brunner: Q. Was this made by you or under your direction?

A. Some of it is in my handwriting.

Q. All of it is not in your handwriting?

A. It was made under my direction.

Q. Did you check the prices that appear on this transcript? A. Yes.

Q. That is as to the sales ceiling prices.

A. Yes.

Q. Specified in this transcript, Plaintiff's Exhibit 1 for identification are true, accurate and correct?

Mr. Reagh: I object to that. The Court takes judicial notice of the regulations. The Court may refresh its recollection as to what the ceiling prices were, but it is not for the witness to testify.

(Testimony of Ollis W. Newman.)

The Court: Is there any question that these prices in the schedule as listed were the ceiling prices?

Mr. Reagh: I have no way of telling.

The Court: This record was submitted to you.

Mr. Reagh: I still have no way of telling, it is impossible for me to check these prices. Mr. McDonald was ill at the time [3] that was done and I had no time to check it. I am not going to be technical about any question of the ceiling price, I will say that to the court, and Mr. Brunner. I am not going to waste any time, but I do not want them to be proved in this way. May I elaborate my objection for the record?

The Court: Yes.

Mr. Reagh: Objected to as immaterial, irrelevant, and incompetent, not the best evidence, the witness being asked to testify to matters that the Court will take judicial notice of, calling for an opinion and conclusion of the witness upon the very matter to be submitted to the Court.

The Court: The objection is overruled.

Mr. Reagh: Exception.

A. Yes.

Mr. Brunner: I offer now, if your Honor please, the transcript, which is marked Plaintiff's Exhibit 1 for identification, in evidence.

Mr. Reagh: In this matter, your Honor, as to the portion of the document regarding the ceiling price I take it that is already covered by your Honor's ruling, and I renew by objection to that.

(Testimony of Ollis W. Newman.)

As to the transcript of the transaction involved, I object on behalf of the defendant as immaterial, irrelevant, and incompetent, not the best evidence, no proper foundation having been laid, calling for an opinion and conclusion of the witness on the precise matter in controversy, and as to the [4] duty of the defendant in the pre-trial order to have studied and set forth any discrepancies, I object on the ground that the pre-trial order calls upon the defendant to violate his privilege under the bill of rights, in that the matters and things charged in the complaint could have been made and now are the subject of a criminal prosecution under section 4. I further object on the ground that the defendant was called upon to expose himself to penal punishment by the demand made upon him, under penalty of having made an admission in pointing out anything in this transcript to which he objected. It is improper practice to demand of defendant under penalty of being guilty of an admission that he pointed out particular items and be deemed to have admitted all of the rest——

The Court: I do not want to interrupt you, but you are arguing the matter.

Mr. Reagh: I am trying to save time, I am trying to state my grounds of objection only.

The Court: I do not understand that this transcript is being offered as an admission. Unless I am incorrect the witness testified that this is a correct copy of the records that were furnished him by the defendant. The witness' testimony is that

(Testimony of Ollis W. Newman.)

it is correct as to the ceiling prices from the data which was assembled from the record of the defendant. Is that correct? A. Yes.

The Court: Is there anything you wish to add to your ob- [5] jection?

Mr. Reagh: If your Honor please, I have sufficiently stated my grounds of objection; that is all.

The Court: That is up to you. You can state any grounds you wish.

Mr. Reagh: The defendant through his counsel specifically sets up a claim to immunity under the Bill of Rights for being required to furnish testimony against himself, and under the necessity at free trial conference of indicating objections or being deemed to admit all else contained in it.

The Court: Inasmuch as there is no question of procedure involved I do not think that there is anything to the objection. It is overruled. The exhibit may be admitted in evidence.

(Plaintiff's Exhibit 1 For Identification was thereupon admitted in evidence.)

Mr. Brunner: That is all.

Cross-Examination

Mr. Reagh: Q. The only record you saw was the sales tags, was it not? A. Yes.

Q. That is all you saw, was it not?

A. Yes.

Mr. Reagh: That is all.

The Court: Anything further with this witness?

Mr. Brunner: No, your Honor. I will call Mr. Larney. [6]

ALBERT L. LEARNEY,

called as a witness by Plaintiff; sworn.

The Clerk: Will you state your name to the Court and jury, please?

A. Albert L. Learney.

Mr. Brunner: Q. What is your business or occupation, Mr. Learney?

A. Price specialist, Office of Price Administration.

Q. As price specialist in the Office of Price Administration, what are your duties?

A. To make available to anyone rules and regulations covered by OPA laws.

Q. I will ask you whether or not that includes regulations of the Office of Price Administration?

A. Yes, it includes the regulations of the Office of Price Administration.

Q. Is there any particular field of those regulations in which you specialize?

A. At that time in meat.

Q. At that time in meat? A. Yes.

Q. How long have you been with the Office of Price Administration?

A. Since March 12, 1943.

Q. Do you know A. N. McDonald?

A. I have met Mr. McDonald.

Q. Did you ever meet Mrs. McDonald, who is sitting behind Mr. Reagh?

A. I do not believe so, I do not remember.

Q. Have you ever met Mr. Finke?

A. I do not believe so.

(Testimony of Albert L. Learney.)

Q. To your knowledge, has any request been made of you or the Office of Price Administration for information concerning price regulations by either Mr. McDonald, Mr. Finke, or Mrs. McDonald, prior to the 1st of June, 1943?

A. I cannot state the date. [7] If I may explain, the first request was by the bookkeeper, I believe, just about the time Mr. McDonald returned from the East.

Mr. Brunner: July 4, will you stipulate to that?

Mr. Reagh: July 9, if you want the stipulation.

Mr. Brunner: We will put it on that basis; this witness spoke to Mr. McDonald after he returned from the East, whatever time that was.

Mr. Reagh: July 9th.

Mr. Brunner: Q. In your capacity as price specialist, what are your duties with respect to being familiar with prices which are provided in the regulations for meat?

A. I interpret the regulations as to price and as they apply to a particular business.

Q. By that do you mean that you are given the facts applying to a particular situation, and from those facts which are given to you determine the proper price?

A. That is right.

Q. How does an individual who comes under price regulation obtain the advice and information which you are prepared to give?

(Testimony of Albert L. Learney.)

A. By either applying for it or coming to the office and soliciting our advice in the matter.

Q. Do you give information on the telephone?

A. Yes.

Q. Do you give information by letter?

A. Yes.

Q. Will you state how much of your time is given to that particular function and duty of giving information on the request [8] of individuals who seek knowledge of how to conduct their business under the regulations?

A. I would say about 90 per cent of my time.

Q. On meat at the time in question, last year in June or July, or thereabouts, were there any others besides yourself giving information from the Office of Price Administration, if you know, on the applicability of regulations?

A. The Food Section Control.

Q. In the Food Section of the Office of Price Administration, the price staff is composed of how many persons, or was composed of how many persons in June and July. A. Six persons.

Q. Consisting of whom?

A. A commodity specialist specializing in different commodities, such as meat, groceries, dairy productions, etc.

Q. Will you state whether or not they have a legal adviser to advise them and the public in connection with that particular work?

A. Each commodity section or each department of the Food Section has its Food Section Attorney

(Testimony of Albert L. Learney.)

and in turn they have the District Office Attorney in case the Food Section Attorney happens not to be there.

Q. Will you state whether or not the advice of that attorney is available to the public or was available to the public on request in May, June and July of 1943?

A. It was available.

Q. I show you here, Mr. Learney, Plaintiff's Exhibit 1 in Evidence, consisting of a transcript of certain dealings of the [9] McDonald firm for the period providing mostly the month of June, 1943, and I will ask you if you have seen that before.

A. Yes, I have.

Q. When?

A. I could not state the date it was brought to me by investigators in the enforcement division to check the price that they used as the ceiling price.

Q. Will you state whether or not you examined these invoices for the ceiling prices to see that they were the appropriate ceiling prices?

A. I checked the ceiling prices as stated there.

Q. Checked them against what?

A. The regulation, itself, as it applied to this area, showing the prices.

Q. Will you state whether or not, during that period of June, 1943, there was any major change in prices?

A. There was a major change, that is why this particular piece of work needed immediate exam-

(Testimony of Albert L. Learney.)

ination, because there was a so-called roll-back took place in the middle of June, on June 14 that was.

Q. What did that roll-back amount to in cents per pound? A. Roughly, 2 cents.

Q. Was that the roll-back that gave rise to the question which was discussed? A. Yes.

Q. In your examination of the transcript and ceiling prices specified, do you recall now whether you found any errors and suggested any changes in the prices considered by the investigators?

A. No, I found no errors. We always submit new prices even to investigators, so that when the price change comes we [10] work out the price for them, and they simply use the price which I had submitted.

Q. You checked to see if the prices they had used were the same as you had given them, is that correct?

A. That is right.

Q. Will you state then whether or not the prices specified in the transcript as the ceiling prices are true, accurate and correct ceiling prices computed under the regulations?

Mr. Reagh: May it be understood that I have the same line of objection to this testimony that I have made?

The Court: State your objection; make your objection for the record.

Mr. Reagh: May I have the same objection to this testimony that I had to the testimony of Mr. Newman?

(Testimony of Albert L. Learney.)

The Court: Your objection to this question is on the same ground that you objected to the same question of the other witness?

Mr. Reagh: Yes, your Honor.

The Court: Yes.

Mr. Brunner: Q. I will ask you, Mr. Learney, whether you have checked, or in your work you have checked the amount of overcharges that appear from this transcript.

A. No, I did not.

Q. You did not? A. No.

Mr. Reagh: Mr. Brunner, I will probably be prepared to stipulate to that.

Mr. Brunner: You may cross-examine. [11]

Cross Examination

Mr. Reagh: Q. Mr. Learney, did you circularize the trade, informing them that you were at their service to advise them?

A. We are not so equipped to circularize.

Q. Then if a lady was not a butcher, merely the wife of a butcher, and troubled about the ceiling price, she would not have any way of knowing you had an office over there?

Mr. Brunner: I object to the question——

Mr. Reagh: Withdraw it.

Q. Mr. Learney, how many grades of meat—let us take first, how many grades of beef were there prior to the 14th of June, 1943, under the price regulations? A. Five.

Q. How many grades of beef were there?

(Testimony of Albert L. Learney.)

A. It is according to what types of meat, retail or wholesale.

Q. How many grades of pork were there prior to the 14th of June?

A. One grade of pork—there is no grade on pork.

Q. How many grades of mutton?

A. There are three grades of mutton.

Q. How many cuts of mutton?

A. Wholesale, do you mean?

Q. Wholesale and retail.

A. Wholesale and retail, there were approximately 10.

Q. Isn't it true that in order to secure uniformity throughout the United States the Price Administrator required beef to be cut in a certain way and that way differed from the method that had theretofore been used in the meat industry of this cate- [12] gory?

A. Not necessarily; it did at retail, but not necessarily at wholesale.

Q. It may or may not have differed?

A. Providing sufficient cuts, to make many different cuts in the carcass that were made before.

Q. Butchers were required to cut, under the requirement of the Price Control Act, in a certain way?

A. Yes.

Q. That way was different from the way that had been employed in this community before that time, is that not true?

A. Not necessarily.

(Testimony of Albert L. Learney.)

Q. In part?

A. There was no difference whatever in pork.

Q. I am talking about beef.

A. No difference in lamb, no difference in veal, and the difference in beef was an individual's own difference he might have had in cutting.

Q. Mr. Learney, can you tell me what the grades of beef you just mentioned are?

A. AA, Choice, A Grade, B Grade, Commercial, C Grade, Utility, and Canner and Cutter.

Q. Now, for the moment I am talking about beef. The first you say is AA?

A. Double A.

Q. And the second is Choice?

A. The second is Good or A grade.

Q. Does everybody agree as to whether a certain carcass should be Grade A or Double AA?

Mr. Brunner: Objected to as argumentative, and not proper cross-examination.

The Court: I will sustain the objection to that question. [13]

Mr. Reagh: We offer to show on cross-examination——

The Court: I think the form of the question is objectable, you asked if everybody agreed.

Mr. Reagh: It would be a question of opinion, would it not, as to whether a particular carcass should be graded A or AA?

A. The grading of carcasses is done by an expert from the Department of Agriculture.

Q. At the abattoir?

A. At the abattoir.

(Testimony of Albert L. Learney.)

Q. Was that true prior to the first price control?

A. Not in this section of the country, except for government buying.

Q. When did price control start in beef?

A. It started right after March, 1942. Specific prices were set up, I believe, in November or October, 1942.

Q. And at that time grading was instituted at the abattoirs?

A. Yes.

Q. By government experts?

A. Yes.

Q. Working under your direction?

A. Not under my direction.

Q. Did they stamp carcasses?

A. Yes.

Q. What part did they stamp as to beef?

A. The full length of the beef, and each side of the back down.

Q. How many recognized cuts under the Office of Price Administration of beef were there in June, 1943?

A. There was first of all the whole carcass, sides or the four quarters comprising the carcass; that is broken down into primary or wholesale [14] grades such as round, sirloin, short loin, blank, plate, brisket, rib, chuck and foreshank.

Q. Is that broken down again?

A. In turn, that is to cuts prevailing to purveyors of meals, and those cuts are further broken down into ready to cook pieces.

Q. That is the beef must be already cut?

A. Either already cut or in a piece ready to be cut.

(Testimony of Albert L. Learney.)

Q. I notice on this chart here ground meat; what was the ceiling price of ground meat in the month prior to the 14th of June, 1943?

A. I believe it was 21 cents for that particular one.

Q. What is ground meat?

A. Ground meat, ground beef, is specified in the regulations.

Q. Is ground meat specified?

A. Ground meat, ground beef.

Q. You testified a moment ago that the price on there for ground *mean* was correct, didn't you?

A. Yes, that price is correct.

Q. What is ground meat?

A. Ground meat in the trade usually is known as ground beef; occasionally they will call it by a different name.

Q. Can't you grind any part of the beef carcass?

A. Yes.

Q. What is commonly known as hamburger is ground meat? A. Yes.

Q. That is chuck and various parts that would be sausage otherwise?

A. Not according to the OPA.

Q. What is regulation?

A. In the OPA regulation they say ground beef is known as ground meat, and they stipulate—I don't know the exact wording of the regulation, I would not try to [15] repeat it, but they stipulate a certain price as being the highest price that might be charged for ground meat, ground beef.

(Testimony of Albert L. Learney.)

Q. Under the regulations could I go to a butcher shop, and could I in the month of June, 1943, have gone to a butcher shop and asked them to grind a sirloin steak for me? A. At retail, yes.

Q. If they had grown that piece of sirloin I would have to pay the sirloin price, wouldn't I?

A. That is at retail.

Q. Now, couldn't a purveyor of meat order any part of the carcass ground that he wanted to?

A. No.

Q. He could not?

A. He is not allowed to.

Q. Was it impossible for a customer to order ground round in the month of June, 1943?

A. According to regulations, yes.

Q. It would have to be ground round?

A. It could not be ground for anyone at all.

Q. In other words, a man who had a restaurant had to buy hamburger or had to pay hamburger prices no matter what was ground into that meat?

A. Yes.

Q. What was the ceiling price to the 14th of June, or what was the ceiling price on the 2nd of July? A. On what date did you say?

Q. On the 2nd of July, 1943?

A. The basic price was 19 cents a pound.

Q. There were certain other things that could be charged.

A. A quarter of a cent for delivery. [16]

Q. It made no difference in *grand* of meat?

A. No difference.

(Testimony of Albert L. Learney.)

Q. What was the price of top sirloin?

A. I do not attempt to remember the price.

Q. Can you refresh your recollection by reference to Exhibit 1? Can you refresh your recollection? You have the Price Control Act, haven't you, with you? Have you got the regulations here with you that were in effect at that time, Mr. Learney?

A. Prior to the roll-back?

Q. Yes, prior to the roll-back.

A. I have.

Q. Will you produce it?

A. This is the price subsequent to the roll-back.

Q. You have not got the price prior to the roll-back?

A. No.

Q. Will you be kind enough to call my attention to the regulation, or could you call my attention and indicate to me which of your regulations prohibit the selling of ground meat to purveyors?

A. Maximum Price Regulation 169. I have not it here.

The Court: The Court has a copy of 169, I think, in chambers.

Mr. Brunner: I doubt if your Honor has that.

Mr. Reagh: I doubt it, too. I was not able to find it.

Q. Are you familiar with this document, Mr. Learney?

A. We do not use those.

The Court: He may call it to your attention after the recess. [17]

Mr. Reagh: Would you be good enough to call my attention to the precise regulation after recess?

(Testimony of Albert L. Learney.)

A. Yes.

Q. When you checked Exhibit 1 did you check to determine whether or not the items were carried forward correctly?

A. All I checked was the price, correct ceiling price in effect.

Q. In checking those did you allow for delivery?

A. We did.

Q. Did you allow for grading?

A. Where grades were specified on the transcript.

Q. If the grades are not specified, you allowed the highest grade? A. Yes.

Q. It is customary, is it not, in some restaurants to serve hamburger mixed with sausage meat?

A. I would not know that; they could, yes; it would be possible.

Q. Are purveyors of meat permitted to sell ground meat, a combination of hamburger and sausage meat?

A. I imagine he could mix the things.

Q. That is true of ground meat?

A. Once it reaches the restaurant it is a different item.

The Court: I think we will take the noon recess at this time.

(After the usual admonition to the jury a recess was here taken until 2 o'clock p.m.) [18]

Afternoon Session, August 22, 1944, 2 P.M.

ALBERT L. LEARNEY,

recalled.

Cross-Examination—(Continued)

Mr. Reagh: Q. Mr. Learney, you have in your possession a price regulation which you showed to me, to which we referred this morning?

A. Yes.

Q. May I have it, please? A. Yes.

Q. This is not the only copy you have, is it?

A. This particular copy is the only copy.

Q. Is it in words and figures, except the price, the same as the current regulation?

A. This happens to be an amendment to that particular regulation.

Q. May I have the current regulation?

A. Yes.

Q. You have plenty of these, haven't you?

A. Yes.

Mr. Reagh: I am going to offer it for identification as part of the cross-examination of the witness. I suppose the Court will take judicial notice of it, but at the same time perhaps I had better have it marked.

Mr. Brunner: That is all right.

Mr. Reagh: May I offer it in evidence as part of the witness' cross-examination?

The Court: I do not think that would be proper.

Mr. Brunner: Do you make an offer?

Mr. Reagh: Yes, as part of the cross-examination. [19]

(Testimony of Albert L. Learney.)

Mr. Brunner: I will object to it, if your Honor please, upon the ground that a great deal of the regulation is immaterial, and also on the ground that the regulation is the best evidence.

Mr. Reagh: The reason for doing that was Mr. Learney said that the copy he had was the only copy he had, and I did not want to put that in evidence and take it out of his possession. If you press the objection I will have to do so; it is the same as the other regulation except as to price.

The Court: I will permit you to have it marked for identification, so that you may have some means of referring to it. The regulations are not admissible in evidence. The court will instruct the jury as to what the regulations provide, but if you desire to question the witness as to a particular item of the regulations at that time, as to what the ceiling price was, of course you have a right to do that.

Mr. Reagh: That is not the purpose. I did not wish to deprive Mr. Learney of his only copy.

The Court: It has already been marked for identification. You can examine the witness on it.

Mr. Reagh: If Mr. Brunner *sees* fit to press that objection it is good.

Mr. Brunner: I fail to see the connection.

Mr. Reagh: I will withdraw this. Will you let me have that copy that you have?

A. Yes. [20]

Mr. Brunner: Your question is directed to ground beef?

(Testimony of Albert L. Learney.)

Mr. Reagh: Yes. Now, we offer this and ask that it be marked as part of the cross-examination.

The Court: I will allow it to be marked for identification. It is not in evidence, because it is the duty of the court to instruct the jury as to the law.

(The regulation was marked Defendants' Exhibit A for Identification.)

Mr. Reagh: Q. I observe, Mr. Learney, that Plaintiff's Exhibit 1, which heretofore has been shown to you, bears the handwriting of several different people. You checked that, did you?

A. I did not check that.

Q. When you checked that you assumed that the persons who had written that out had copied it from some original document?

Mr. Brunner: I think that is not proper cross-examination, and he is assuming the answer, for the reason that I recall Mr. Learney said he merely had checked the figures against the regulation.

Mr. Reagh: That is correct, and I withdraw the question.

Q. What you did on this was merely to check the figures to be sure that the items shown and amounts stated and the weight and maximum price regulation corresponded?

A. I did not check that. The only thing I checked was what they had noticed there as the ceiling price as being the actual ceiling price.

Mr. Reagh: That is all [21]

Mr. Brunner: No further questions. I would

(Testimony of Albert L. Learney.)

ask the Court's indulgence to recall Mr. Newman for a few more questions.

OLLIS W. NEWMAN,

recalled by plaintiff.

Mr. Brunner: Q. Mr. Newman, in considering the prices which appear, that is the ceiling prices which appear in Plaintiff's Exhibit No. 1, did you have in mind the fact that grading enters into the question of price?

A. Oh, yes.

Q. And in computing the price what grade did you use where the invoices did not show the grades of the meat that was sold?

Q. We always examine all of the meat available in the shop whenever we are making an inspection, and in some cases I follow the meat to the destination, and identify the meat. As was stated this morning on beef, particularly, the grand mark, the Government grade mark on the beef sold; because the invoice does not show the grade does not mean that the meat was not graded.

Q. In computing the prices which you testified you had computed, that is the proper applicable maximum prices, you took into consideration, did you not, what grade it was?

A. Generally speaking, I think it was B grade.

Q. I show you Plaintiff's Exhibit No. 1 in evi-

(Testimony of Ollis W. Newman.)

dence, the second page, which is marked B on the upper right-hand corner? A. Yes.

Q. "Grade B figured." A. Yes. [22]

Q. Is that in your handwriting?

A. That does not happen to be my handwriting, but it was put there at my instructions.

Q. Will you say that was true with these items?

A. Oh, yes.

Q. Do you know what grade was used in figuring lamb?

A. I could not tell you now, it has been quite sometime.

Q. You do not now recall? A. No.

Q. I understood you to say that you looked at the meat in a particular shop at the time you made an investigation. A. Yes.

Q. I am referring to the shop of the seller, not the shop of the buyer.

A. The shop of the buyer.

Q. You did not go to the shop of the buyer here, did you? A. Yes.

Q. In every instance?

A. No. Wherever there was a question of doubt we always raised the grade.

Q. Raised the grade? A. Yes.

Mr. Brunner: That is all.

Cross-Examination

Mr. Reagh: Q. How many shops did you go to?

A. Well, I do not believe I could answer posi-

(Testimony of Ollis W. Newman.)

tively but I would say at least over half a dozen.
You are speaking now of grades?

Q. Yes.

A. And we followed out a large part of the invoices to destination.

Q. When did you get these invoices?

A. We got these invoices in July.

Q. You got them in July? A. Yes. [23]

Q. Then you went to the shop to see what grade was delivered? A. Yes.

Q. The meat had been consumed, hadn't it?

A. Not in all instances.

Q. A person who ordered hamburger, for example, in June, did they still have hamburger on hand in July? A. No.

Q. If a person ordered beef stew on the second day of June, the Two Flags down here, beef stew on June 2, when did you go to see the Flags?

A. We went to Flags to identify other things in connection with the invoice.

Q. Did you go to Pearce's?

A. That is a restaurant.

Q. Yes? A. Yes.

Q. Did you go to Hamburger Gus?

A. Yes.

Q. To Jimmie's? A. Yes.

Q. How many times did you go to Jimmie's?

A. We called at Jimmie's twice.

Q. How many times did you call at Peace?

A. Once that I know of.

(Testimony of Ollis W. Newman.)

Q. How many times did you call at Hamburger Gus'?

A. Twice.

Q. How many times did you call at Mead's?

A. Only once that I know of.

Q. How many times did you call at Garcia's?

A. I called once.

Q. How many times did you call at Floyd's?

A. I don't remember.

Q. At John's?

A. I did not go to his place.

Q. At Monroe's?

A. I did not go to his place. [24]

Q. How many times did you go to Stacey's?

A. I don't remember that one. He had a lot of accounts.

Q. How many times did you go to Bean's?

A. I don't remember that one.

Q. How many times did you go to Waho's?

A. I think we were there once.

Q. How many times to Cirius'?

A. I don't remember.

Q. How many times did you go to Butte?

A. I don't remember that one.

Q. How many times did you call at Mother's Cafe?

A. We did not go to all of them, he had a lot of accounts.

Q. How many times did you go to the Golden West Tamale Company?

A. Not at all.

Mr. Reagh: That is all.

Mr. Brunner: That is all.

(Testimony of Ollis W. Newman.)

The Court: Have you any more witnesses?

Mr. Brunner: The plaintiff will rest.

The Court: Do you desire to make a motion now, counsel?

Mr. Reagh: Yes, your Honor.

(Thereupon the jury retired to the jury room.)

Mr. Reagh: The defendant, plaintiff having rested, now moves that the court direct the jury to return a verdict in favor of the defendant, for the reason that the proof utterly fails to establish any case, in that there is a complete failure of proof that there was anything other than misbilling, the testimony of the witness having been that Plaintiff's Exhibit 1 [25] upon which he relied was simply a transcription or copy of the carbon copies of bills which had been sent; there is no proof of any transaction, that any merchandise was ever delivered, that any merchandise was ever paid for, that any merchandise was ever ordered or sold to any of the persons whose names appear in the margin of Plaintiff's Exhibit 1. I understand the court's ruling heretofore will be adhered to, that this is not a penal statute; the position taken by the defendant is that it is a highly criminal statute, and in view of the amendment which has been made in the last session of Congress it seems hard to understand how it could be treated other than a criminal statute; the amount of damages for overcharges may depend entirely upon intent, and it is our position that the statute is penal, that strict

proof is called for in support of a penalty, everything must be proved and nothing left to surmise.

I renew our objection to Plaintiff's Exhibit No. 1, and move to strike it out, on the grounds stated in our objection when it was received in evidence, and without Plaintiff's Exhibit 1 there would be no case; we believe that Exhibit No. 1 is not the best evidence of any kind; at most Exhibit No. 1 might be treated as secondary evidence that Mr. McDonald or somebody had sent out bills for merchandise in excess of the ceiling price; they are not contracts, they are not charges.

The Court: I do not want to interrupt you, but I did not understand that was the testimony. I understood the tes- [26] timony to show that this Plaintiff's Exhibit 1 was a tabulation of the actual sales slips——

Mr. Reagh: Of the invoice slips.

The Court (Continuing): ——of the defendant for merchandise that was actually sold and delivered.

Mr Reagh: There is no showing that any merchandise was sold or delivered. The showing is that the plaintiff went to the defendant's place of business and asked for and was given some tags.

The Court: As I understand it this transcript is a copy of the records of the defendant.

Mr. Reagh: No, it is an abstract of these sales tags.

The Court: But it is an abstract, a copy of the defendants' own records.

Mr. Reagh: Of the sales tags found in his place of business.

The Court: I think if you prove from a man's own records that he made a sale that is at least some evidence from which the jury can conclude that those sales and deliveries of merchandise were made. That could not be said to make out a *prima facie* case, but to go beyond the defendant's own records and actually prove by the man in the store, the customer, and the man on the truck, that took it to the place of delivery, I think that type of proof would be far beyond any normal requirement. [27]

Mr. Reagh: It would possibly in some cases, but in the case of a penal statute penalties are not favored in the law; they are disfavored.

The Court: I do not think any higher degree of proof is required in this case, the case being a civil case, than any other type of case, unless the statute so provides. However, I did not want to interrupt you. I just wanted to clarify my mind as to what your point was.

Mr. Reagh: Now on the question of damages, from the record as it stands it is impossible to fix any sum for damages, because when your Honor examines Exhibit No. 1 your Honor will see that it is based entirely on guesswork, in that the grades shown by the evidence have varying prices. These grades are shown as B and C. I asked Mr. Newman on the witness stand how many times he had been at the various places and two was the greatest

number he had been, and the only place mentioned that he had been two times is mentioned in at least 25 different items, and he fixed the grade from what he saw on two occasions without following the meat for getting the grades that number of times; he might have said three; he took the grades of them and averaged them. For a business man to make up his mind on a question of damage that might be sufficient, but for a man who seeks to recover damages in court he must go further than that, he must show what the damages were specifically on each of the items on page after page. An effort was made to show that he followed the meat [28] through, but on cross-examination it developed he only followed it through possibly for incidental purposes, but certainly not enough upon which a jury could base a verdict on damages. It does not appear that he followed through the meat to get the grades; in other words, the jury could only conjecture as to the grade of meat shown by Plaintiff's Exhibit 1.

Moreover, when your Honor examines Exhibit 1 you will find that the person making it out did not know what he was copying. You will find on page after page that the writing is so bad that a question mark appears, you cannot tell what it means. Some places the question mark is in red ink. Some person who could not read the handwriting made this copy; in some places you cannot make out what was sold. Now, how can a jury base its verdict entirely upon this. Here, for example, we have

hearts with a question mark, weight $7\frac{1}{4}$, price 30, C.P. $17\frac{3}{4}$, overcharge 88 cents. The person who put that overcharge of 88 cents did not know what it was that he was putting an overcharge down for. In some way or another the jury has got to fix on a specific amount.

The Court: Why didn't you bring these matters out on cross-examination, if you think there was anything inaccurate in that statement?

Mr. Reagh: The statement is there and speaks for itself.

The Court: Why didn't you go into those matters and examine the witness who made the statement? [29]

Mr. Reagh: Why should I go into the statement? Your Honor has admitted it in evidence, and there it is, and upon that the plaintiff rests. It is not for me to point out discrepancies; if a document is in evidence it speaks for itself.

The Court: The document was introduced in evidence on the basis of the testimony of the witness who testified that it was a correct transcript of the sales records of the defendant, and that there was appended to it the ceiling price of each item and of the price actually charged, and upon the basis of such testimony Exhibit 1 was admitted in evidence. Now, if you wanted to attack that you could have cross-examined the witness and developed matters that go to the credibility and weight of this statement. I do not see how I am called upon to make

a ruling in connection with it now without having in the record what you are suggesting now.

Mr. Brunner: We sought to accomplish that by pre-trial.

Mr. Reagh: How could that help us? I couldn't read your handwriting; I should be given something I could read.

Mr. Brunner: If you pointed out to us the particulars you could not read we would be glad to discuss those questions and maybe we could have smoothed them out.

Mr. Reagh: You should strike out at least one-third of this.

The Court: You cannot escape the effect of the exhibit by your own inaction in regard to it. If you had wanted to [30] point out those matters you could have pointed them out. The Court cannot direct the attorney in the proof he makes in offering it in evidence.

Mr. Reagh: Your Honor expects the defendant to prove its case. It is for the plaintiff to prove his case. My point is that no jury can base its verdict upon a document like this.

The Court: You have had an opportunity to go into this matter before the trial and you still have an opportunity to examine the OPA witness to find out whether there is any question about any of these matters.

Mr. Reagh: I would rather not. It is a technical proposition.

The Court: You simply want to take the position you do not want to look into those matters?

Mr. Reagh: That is exactly right.

The Court: It is not for me to tell you how you should handle your case, you are an experienced lawyer and I would not even presume to do that, but I can rule on such questions of law as are presented to me. Have you stated all of the grounds you wish to state for a directed verdict?

Mr. Reagh: I think so; no proof of delivery, no proof of payment, and no proof of any sale of merchandise, no proof of the grade of the merchandise, no proof of payment. The exhibit is too indefinite and too vague and too uncertain to be the basis of a judgment. [31]

The Court: The motion for a directed verdict will be denied. You may bring the jury back.

(Thereupon the jury was returned to the court-room.)

The Court: The jurors are all present, you may proceed.

Mr. Reagh: I have already made my opening statement. I will call Mrs. McDonald.

MARY E. McDONALD

called as a witness by the defendant; sworn.

The Clerk: Will you state your name to the Court and jury, please?

A. Mary E. McDonald.

(Testimony of Mary E. McDonald.)

Mr. Reagh: Q. Mrs. McDonald, the defendant A. N. McDonald is your husband, is he not?

A. Yes.

Q. The business in Oakland conducted by your husband is partly retail and partly wholesale, selling to restaurants and people of that kind, is it not?

A. Yes.

Q. Did your husband leave Oakland in the month of May, 1942?

A. He went about the 18th of May.

Q. Do you know where he went?

A. He went back home. The doctor thought he should go back home to get a rest and get away from the business, he was working too hard.

Q. Where did he go to, you say he went back home?

A. He went back to near Montreal.

Q. Do you know how long he intended to be gone when he left?

A. He thought about three weeks, between two and three weeks. [32]

Q. When did he return?

A. He returned the 9th of July.

Q. The 9th of July, 1943? A. Yes.

Q. Do you know the reason for his failure to return sooner?

A. Well, he took sick up there, and when he was able to return home there was a death in the family at Seattle, and I had to go there.

Q. While he was gone were you in charge of the business, Mrs. McDonald?

(Testimony of Mary E. McDonald.)

A. I was, I was trying to do it.

Q. How many employees, normally, are employed in the shop?

A. Before the war we used to have about seven or eight.

Q. At that particular time when Mr. McDonald went away how many people were there working?

A. When he went away, there was a man in the wholesale, and Mr. Finke and one man in the retail, and myself.

Q. There had been a contemplated partnership between your husband and Mr. Finke before that time?

A. Yes.

Q. That had fallen through?

A. Yes.

Q. Now, after Mr. McDonald went away did all of the employees stay, or did some of them leave?

A. No, the men that we had to help went to work at the shipyard, two of them were drafted, and then we had a man that used to work a while but he went out celebrating and we could not depend on him.

Q. What does your own household consist of?

A. I had two girls, one of whom was sick, and I had my son, who went away.

Q. These men that were drafted and the men that went to the [33] shipyard, was that during the period of several weeks while your husband was away, or did that occur before he left?

A. Just about that time, some of them went before and some of them were not there at the time, I don't know just when they left, it was within a few months.

(Testimony of Mary E. McDonald.)

Q. Who does the housework at your house?

A. I do.

Q. How old is your eldest daughter?

A. Well, she will be sixteen, she is only in grammar school, she has not been well.

Q. How old is your second daughter?

A. She is ten.

Q. At that time she was nine? A. Nine.

Q. Mrs. McDonald, did you, yourself, work in the business there during the time your husband was away? A. Yes.

Mr. Brunner: I am going to object, your Honor, for the purpose of the record. I take it that this question by counsel is directed to the so-called Chandler defense under the Act. I might call your Honor's attention to the fact that the defense is not pleaded.

The Court: I do not think that has to be pleaded, it has to be proved.

Mr. Brunner: It is our position it has to be pleaded as part of the defense. We are entirely willing to consent in order that counsel may save any point on that that he may amend to so state.

The Court: I will overrule the objection.

Mr. Reagh: Q. Mrs. McDonald, did you intend to violate [34] any OPA regulation?

A. No.

Mr. Brunner: That calls for a conclusion.

The Court: I think that calls for the opinion and conclusion of the witness.

(Testimony of Mary E. McDonald.)

Mr. Reagh: Q. Did your husband instruct you to violate, to sell meat at other than ceiling prices?

A. No, he told me to try to follow the bills or the pamphlets or whatever it was that come out from the OPA, or from the Butchers Union, whatever they were.

Q. There was a pamphlet that came?

A. Yes, with prices and cuts, and he said to follow it as closely as I could and do the best I could, and people would come in, they couldn't get meat any place else, they would be in a hurry, they would want something, and Mr. Finke would work sometimes eighteen and twenty hours a day trying to get out the orders and do the best he could, and might have made mistakes, but if he did it was unintentional.

Q. Did you instruct anybody to sell at a price higher than the price posted? A. No.

Q. Who did the billing, Mrs. McDonald?

A. Well, sometimes I did if they were in a hurry for it; we never yet had a customer that had a complaint; they knew that Mr. McDonald would not intentionally overcharge them, he never had a complaint; if the bill was not made out at the time they would wait until I was able to. [35]

Q. At this particular time who did the billing?

A. I did most of it, as far as I can remember.

Q. Mrs. McDonald, you are not a butcher by trade, are you? A. No.

Q. Do you have any knowledge of grading meat?

A. No.

(Testimony of Mary E. McDonald.)

Q. The only knowledge you have of grades is just the fact that your husband is a butcher and you have heard him talk about it?

A. I know about what meat we had.

Q. In other words, you had an individual's knowledge of meat other than a butcher's knowledge?

A. Yes, that is all.

Q. Did you hear from your husband from time to time while he was in Montreal?

A. Well, his sister wrote most of the time, I got messages.

Q. After he got sick his sister wrote?

A. Yes.

Mr. Reagh: That is all.

Cross-Examination

Mr. Brunner: Q. Mrs. McDonald, when your husband was away you say that you tried to follow posted prices. What prices were those?

A. Well, they came in, we had printed sheets, I don't know where they were from, they were posted up, and when the bill was made out, whatever price appeared as what they were selling for, I tried to follow them.

Q. What I was interested in primarily was this question of posted prices. Did you get a slip of some kind from someone?

A. I don't know where it came from, but there was one in the shop there. [36]

Q. You don't know whether it came from the Office of Price Administration or not?

(Testimony of Mary E. McDonald.)

A. No, I couldn't say about that.

Q. I understood you to say that your husband, when he left, told you to try to keep in line with the prices at the Office of Price Administration, is that correct?

A. Well, he said whatever the prices was to try to follow them, and I did, as near as could, and Mr. Finke, he would tell me if I was mixed up in it.

Q. Mr. Finke is a butcher, is he not?

A. Yes.

Q. You carried on the bookkeeping end of the business and billing, isn't that true? A. Yes.

Q. Mr. Finke carried on the cutting of the meat and the cutting up of the orders, and such things?

A. No, we all helped to put up the orders.

Q. You helped put up orders? A. Yes.

Q. But Mr. Finke cut the meat for you, did he not? A. Yes, most of it.

Q. You would go into the meat chest and get the meat, or you would merely wrap up what Mr. Finke gave you?

A. Sometimes I would go into the case and get some meat, whatever it was.

Q. That was already cut?

A. That was already cut, and put them up.

Q. But at the times when you went in to get it you never checked what grades of meat they were, you never checked whether it was A or B?

A. He would tell me where to go and I would go.

(Testimony of Mary E. McDonald.)

Q. He would tell you where to go and you would go and get it? [37-8] A. Yes.

Q. And put it up? A. Yes.

Q. But you never checked particular meat to determine whether it was B or C meat? A. No.

Q. All you did was simply go to a particular place and get meat that was there and wrap it up?

A. Yes.

Q. Did you ever, as you were running the business when your husband was away checked for grade under the regulations?

Mr. Reagh: I object to that as immaterial, irrelevant, and incompetent, and calling for a conclusion.

The Court: Objection overruled.

Mr. Brunner: Q. Did you ever check for grade under the regulations?

A. Well, I don't remember doing it, but I did try to follow the way they had been doing, and no one had complained, the authorities had been in there, and nobody had complained anything was wrong, so I was doing the best I could.

Q. You don't know who had been in there?

A. No, we were working so hard, everybody was calling for the meat, and we were doing the best we could.

Q. Doing the best you could to keep them supplied?

A. We had shipyard restaurants, and had schools, and hotels, and colleges, and we did the best we could.

(Testimony of Mary E. McDonald.)

Q. Did you try equally as hard or at all to see that the prices you charged were appropriate and proper?

A. Well, according to what the ordinary prices were, we were not adding anything onto them, except what you are allowed for delivery and for [39] overhead charges and things like that.

Q. You might say then that to the ordinary charges that you had in business you added the ordinary margin of profit?

A. Well, I think so.

Q. Did you ever call at the office of Price Administration and ask anyone whether any prices were proper?

A. No. When Mr. McDonald came back he had me go over and look over things. I went over and got a list for him when he came back.

Q. That was after he returned?

A. When he returned.

Q. Did you then find that the prices that you had been charging were in line with the list that you got?

Mr. Reagh: Just a moment, I object to that as——

Mr. Brunner: I will withdraw the question.

Q. You mentioned something about a list published by some association, is that true?

Mr. Reagh: I did it in my opening statement.

M. Brunner: I thought she did in her testimony.

Mr. Reagh: She said she got a list, she didn't

(Testimony of Mary E. McDonald.)

know the source it came from, a printed list with the maximum prices.

Mr. Brunner: Q. Do you know whether that list was from an association?

A. Well, I didn't work at the shop except when it was very busy. The first time I went down was when meat was so scarce, and Mr. McDonald was out in the country trying to bring in meat, and I would go down and help. That is all I know about how the business was carried on. [40]

Q. When your husband was away you were taking care of the business and helping out but the man who was in actual charge there was Mr. Finke, wasn't he?

A. Well, he was in charge of the work, but Mr. Finke was not any too well, himself; he was working hard, and he said he was not taking any responsibility.

Q. Who made the price list on the meat that was sold?

A. Well, I guess Mr. Finke; he told me to take the prices from the list that was there, so many times at so much, whatever it was.

Q. Then, as I understand it, you were following his directions in pricing certain meat?

A. Yes.

Q. And outside of those directions you did not take any pains, yourself, to determine whether that list which he told you to follow was the proper list, or not?

(Testimony of Mary E. McDonald.)

A. Well, it was a list that was printed there.

Q. And you merely followed the list that he told you to follow? A. Yes.

Mr. Brunner: That is all.

Redirect Examination

Mr. Reagh: Q. Mrs. McDonald, I want to clear up one thing. On your cross-examination you spoke of the customary margin of profit. In pricing meat you paid no attention to what the meat cost, did you? A. No.

Q. In other words, you proceeded entirely on the list posted in your place of business?

A. Yes. [41]

Mr. Reagh: That is all.

Mr. Brunner: That is all.

Mr. Reagh: The defendant rests and renews the motion.

The Court: Do you wish to renew the same motion as before?

Mr. Reagh: May I make it generally on the grounds that were made at the conclusion of the plaintiff's case?

The Court: Very well.

Mr. Brunner: I have a motion I would like to make, your Honor. I think your Honor will probably exclude the jury.

The Court: Do you wish to make that in the absence of the jury?

Mr. Brunner: I think it had best be made in the absence of the jury as it is on a question of law.

The Court: I think we can excuse the jury until tomorrow morning.

Mr. Brunner: I think so.

(Thereupon, with the usual admonition, the jury was excused until Wednesday, August 23, 1944, at 10:00 o'clock a.m.)

The Court: You may proceed, Mr. Brunner.

Mr. Brunner: If your Honor please, before I begin my argument I am going to hand to your Honor a couple of additional instructions; counsel already has a copy, and I likewise hand to your Honor interrogatories which we request be submitted to the jury in connection with the general verdict. Counsel likewise has a copy. [42]

Our motion is, we move for a directed verdict on behalf of the Price Administrator for three times the actual amount of the overcharges, upon the ground that there is no evidence before the court which would call for the exercise of the Court's discretion set forth in the Emergency Price Control Act as amended by the Stabilization Act. The position which the Price Administrator assumes is that which is specified in the instruction.

(After argument:)

The Court: The motion for a directed verdict will be denied. We will now take up the matter of instructions.

(Thereupon the matter of instructions was taken up, at the conclusion of which an adjournment was taken until tomorrow, Wednesday, August 23, 1944, at 10:00 o'clock a.m.)

[43]

Wednesday, August 23, 1944,
10:00 o'clock a.m.

The Court: With respect to the instructions proposed by the plaintiff the Court will give Instruction No. 1, No. 2, and No. 3, and No. 4 in substance; No. 5 it will give the pertinent provisions of the statute; it will give No. 6, the first sentence of No. 7 in substance, the first paragraph of No. 8 in substance; No. 9 is refused, and No. 10 is refused, inasmuch as the Court will instruct the jury in substance in the language of the statute. No. 11 is refused, because it will otherwise be given in substance. The last sentence of No. 13 will be given in substance. No. 12 will be refused, but the Court will instruct the jury that the general law is that a principal is liable for the acts of his agent committed in the course of his employment; the special interrogatories requested to be submitted to the jury will be refused.

As to the defendant's instructions, No. 1 is refused because there are some parts of it that the Court feels are not proper under the circumstances; No. 2 is refused; No. 3 will be given in substance; No. 4 is refused; No. 5 is refused; No. 6, 7, 8, 9, 10, 11 and 12 are refused, as not being germane to any issue of fact in the case; No. 13 will be covered in the course of the general instructions; No. 14 is refused; No. 15 is refused; No. 16 is refused; No. 17 is refused, No. 18 is refused on the ground that the

rule is too general as to actions of this [44] statutory type; No. 19 is refused. The Court intends generally to instruct the jury as to the statutory provision and on the so-called Chandler defense.

The Court intends to instruct the jury that it is for the jury to determine under all of the facts and circumstances whether or not the acts of the defendant were willful and not supervised by practicable precautions, and that if that defense was sustained and the jury so finds that the verdict of the jury could be limited to the actual overcharges.

The Court also intends to comment on the facts with respect to the pre-trial order and Plaintiff's Exhibit 1, offered in evidence to the extent that in the opinion of the Court the evidence is sufficient in that regard to establish the amount of overcharges set forth in Exhibit 1, but that the jury is not bound by the opinion of the court.

The jury may be brought in.

(Thereupon the jury was returned into court and counsel argued the case, at the conclusion of which the Court charged the jury as follows:)

The Court (Orally): Ladies and Gentlemen of the jury, I will ask you to give your attention to the Court at this time so that I may give you the applicable principles of law that will guide you in your determination of this case.

Let me say to you first of all, by the law, you have the exclusive function of deciding the facts in the case. The [45] judge gives you the law and

endeavors to guide you in determining the facts by advising you as to what the legal provisions are that are pertinent to the particular case. As judge of the court I do not express any opinion to you as to what your finding should be in the case, nor do I want you to understand from anything that has taken place in your presence during the trial or from any ruling which the court has made that I intended to say to you how you should decide the case.

During the course of the trial the court has been called upon to pass upon objections and perhaps some comments have been made by the court in making such rulings; such comments the jurors should not take into account, nor should the jury assume from anything the court might have said in the course of its rulings that the court was expressing an opinion as to how the jury should decide this case.

You should, of course, in this suit, as in any case, exclude any sympathy or prejudice from your mind.

Let me first cover some of the simple rules that you should have in mind in weighing the evidence in the case.

Whether or not you believe the witnesses who have testified and the weight to be attached to their testimony respectively is a matter for your sole judgment.

A witness is presumed to speak the truth, but this presumption may be negated by the manner in

which he or she testifies, by the character of his or her testimony, by contradic- [46] tory evidence, or by his or her motives. In passing upon the credibility of the various witnesses, it is your right to accept the whole or any part of their testimony, or to discard and reject the whole or any part thereof.

If it appears to you and it is shown that a witness has testified falsely on any material matter, you should distrust his or her testimony in other particulars, and in that event you are free to reject all of the witness' testimony.

This is a civil suit and the plaintiff has the burden of proving the affirmative allegations of the complaint. As to the special defense upon which evidence has been adduced by the defendant, as I will hereafter point out to you, the burden is upon the defendant in that connection to establish that defense by a preponderance of the evidence, just as I stated to you the plaintiff must establish the affirmative allegations of his charge by a preponderance of the evidence.

A preponderance of the evidence means its greater weight in reference to its credibility; it depends not necessarily upon the number of witnesses testifying, but rather upon the character of the testimony with reference to its probable truth or falsity.

In determining the preponderance of evidence, you should scrutinize the testimony given carefully and in so doing consider the following elements: the circumstances under which the witness testifies; his or her demeanor and manner on the [47] stand;

his or her intelligence; the connection or relationship which he or she bears to either party; the manner in which he or she might be affected by your verdict; the extent to which he or she is contradicted or corroborated by other evidence, if at all; and any other matter which reasonably sheds light upon the credibility of the witness.

The attorneys in their arguments have commented upon and argued upon what the facts are. If you find any variance between the facts testified to by the witnesses and what has been stated to you by counsel to be the facts, to the extent of such variance you must consider only the facts testified to by the witnesses.

Now, I think the court mentioned to you at the time of your empanelment as jurors you should have no preconceived notions about the particular law pursuant to which this case has come into this court. You are not concerned here in trying the Price Control Act; whether you like the law or not, it is a law that has been adopted by you yourselves through your representatives, and therefore no consideration based upon any preconceived notion on your part as to what you think should have been the law or how you like the law, should enter into your consideration of the question of fact which is submitted to you under this law.

This law, which is designated as the Price Control Act, was passed by Congress in 1942, and has been amended on more [48] that one occasion. The Price Control Act was adopted by Congress, as you well know, after some discussion, consideration and re-

flection. Congress determined that the battle against inflation to preserve the domestic economy was regarded as important as the armed conflict itself, and in fact it was stated in Congress it was "unlimited national mobilization in a war for survival". It was further stated in Congress that "of all the consequences of war except human slaughter, inflation is the most destructive".

It was on the basis of that background that Congress concluded that it was essential to the successful conduct of the war to pass this law which is called the Price Control Act. Now, if you bring to a consideration of this case any preconceived notion of your own, to which I have referred, about this law you will not be properly performing your duty as jurors in this court. And it is not amiss to comment to you at this time that in the Federal court for over a century and a half a high tradition in the administration of justice has obtained.

The Price Control Act under which this suit is brought, provides, among other things:

"It shall be unlawful, regardless of any contract, agreement, lease or other obligation heretofore or hereafter entered into, for any person to sell or deliver any commodity, or in the course of trade or business to buy or receive any commodity, [49] in violation of any regulation or order under section 2, or any price schedule effective in accordance with the provisions of section 206, or to offer, solicit, attempt, or agree to do any of the foregoing."

By the Price Control Act there was committed to the Price Administrator power and authority to

promulgate certain regulations. Pursuant to that power and authority he did establish certain price regulations. Among those regulations were certain rules concerning the price to be charged for meat by persons engaged in the same type of business in which this defendant, by the evidence, is shown to have been engaged.

In the event of a violation of a price regulation, that is, in the event that one is engaged in business, and subject to this Act, sells merchandise in excess of the price fixed in the regulation, it is provided that an action may be brought to recover damages for such overcharges.

By the statute a consumer can bring an action for damages for overcharges, but there was committed to the Administrator himself the right to bring such action for overcharges in cases where the overcharges occurred in the course of trade or business, that is, in transactions between merchants.

This court has stated in a case not so long ago decided that apparently it was the intent of Congress that enforcement of the Act by bringing actions for damages for violation of the Act, should not result in intercommercial litigation between merchants; that in cases where there were transactions between [50] merchants, wholesalers and retailers and the like, the Administrator should have the power and the right to bring actions for overcharges, whereas the only case in which an action might be brought by an individual or a citizen would be in the case of where the individual or citizen was actually a consumer of merchandise; and so in this

case, the nature of the business of the defendant being such as is disclosed in the evidence, it was proper for the Price Administrator to bring this action.

Now, at the present time under the law it is the opinion of the court, and I so instruct you, that so far as any damages are concerned in excess of actual overcharges, if the defendant has not proved to you by a preponderance of the evidence that the violations of the Price regulations were neither wilful nor the result of failure to take practicable precautions against the occurrence of violations, you have the discretion of determining how much damages may be awarded over and above the actual overcharges, but not to exceed three times the amount of such overcharges.

By the Emergency Price Control Act of 1942 the Price Administrator, that is the plaintiff, has the authority to fix the maximum price for the sale and delivery of pork, beef, veal, lamb and mutton cuts, sausage items and variety meats, and edible by-products, which he has done by issuance of appropriated regulations.

In this case there is an exhibit which has been admitted in [51] evidence, which is a transcript made by the Price Administrator of the records of the defendant during the period in which it is charged that violations of the regulations occurred, which is known as Plaintiff's Exhibit 1. In connection with this exhibit, the court wishes to advise you as a matter of law as follows: in the Federal

court we have certain rules which are known as Rules of Civil Procedure. The purpose of these rules is to expedite the trial of cases and to provide for stipulations and admissions by the parties so that certain facts may be settled in advance of trial to cut down the time and the labor attending upon the trial; and such facts as may be stipulated to and admitted or ordered by the court may not be inquired into at the trial and may be deemed to be true and correct for the purpose of the trial. Pursuant to that procedure the court made what has been described to you by counsel as a pre-trial order. By that pre-trial order it was determined that the transcript which is marked Plaintiff's Exhibit 1 would be submitted to the defendant and that the defendant could point out any incorrect statements of fact in that transcript, and failing that, the transcript would be deemed to be a correct statement of the facts therein set forth. The record in this case shows that no such errors or corrections were pointed out in that transcript, Plaintiff's Exhibit 1, therefore, is before you as a correct statement of the facts therein contained and may be so considered by you. [52]

It is the opinion of the court that that record, plus the testimony of the witnesses produced by the plaintiff, establishing the fact that overcharges in the total sum of \$4,134.70 were made by the defendant. That opinion of the court, however, is not binding upon the jury. It is merely the opinion of the court and you may come to a different conclu-

sion if you feel that that record does not establish the fact which I just stated to the jury.

You should not assume that because a complaint has been filed you must necessarily award judgment in favor of the plaintiff. There is no presumption that arises from the filing of the complaint that the plaintiff is entitled to judgment. You must determine whether or not the plaintiff is entitled to judgment from the evidence in the case, guided by the instructions of the court.

Now, I have already called your attention, Ladies and Gentlemen of the Jury, to a special defense which the defendant has urged. The defendant, by his counsel, has argued to you that the evidence in this case shows that you should not award damages above the overcharges, because the evidence shows, as contended by the defendant, that the defendant did not act wilfully nor did the violations result from a failure to take practicable precautions against the occurrence of the violations.

I wish to advise you that the term "wilful" as used in the statute means purposely or obstinately. It is designed to [53] describe the attitude of a person who, having a free will or choice, either intentionally disregards the statute or is plainly indifferent to the requirements.

"Practicable precautions" as used in the statute are those precautions that would be adopted and safeguards that would be maintained by a reasonably prudent business man under all of the circumstances to prevent and guard against his violating

price regulations or schedules applying to his business.

An employer or a principal who entrusts the conduct of his business or part of his business to employees or agents is, under general principles of law, bound by the acts of the employees in the regular scope of the employment.

It is for you to determine under the facts and circumstances in this case whether or not the defendant has proved by a preponderance of the evidence that the defendant's violations of the price schedules, if you find that there were such violations, were not wilful and not the result of failure to take practicable precautions to prevent and guard against the occurrence of violations.

It is defendant's duty to inform himself of price regulations and schedules issued by the Price Administrator affecting his business, and it is his duty to conduct his business in such a manner as to prevent violations of such regulations.

Now, Ladies and Gentlemen of the Jury, I think that is a fair and proper statement of the law applicable to this particular charge.

It is your duty, and you are expected, to agree upon a verdict if you can conscientiously do so. You should freely consult with one another in the jury room. If any of you should be convinced that your view of the case is erroneous, do not be stubborn and do not hesitate to abandon your own view under such circumstances. On the other hand, it is entirely proper to adhere to your own view, if after

a full exchange of ideas you still believe you are right.

If you bring in a verdict for plaintiff in this case you should not, in arriving at the amount of the verdict, resort to the so-called pooling plan or scheme. That scheme is for each juror to write down the amount he or she thinks should be awarded, then add up the total and divide by twelve and thus fix the amount of the verdict. Your verdict should be based upon the evidence and not upon the element of chance.

Now, I have given you instructions on the question of damages in this case. I have not intended by giving these instructions to indicate the amount of damages, if any, that you should award. I have given you the instructions as to damages because it is the duty of the court to instruct the jury as to the law on all phases of the case.

I wish to finally caution you that if it becomes necessary for the jury to communicate with the court during its deliberations, or upon its return into court, respecting any matter touching the trial of this case, you should not indicate to the court in any manner how the jury stands numerically, or other- [55] wise, on the issue submitted. This caution the jury should observe at all times after the case is submitted to it and until the jury has reached a verdict.

Whenever all of you agree to a verdict, it is the verdict of the jury. In other words, your verdict must be unanimous.

When you retire to the jury room to deliberate, you will select one of your number as foreman or forelady, and he or she will sign your verdict for you when it has been agreed upon, and he or she will represent you as your spokesman in the further conduct of this case in this court.

Do either counsel wish to note any exceptions?

Mr. Brunner: Yes.

Mr. Reagh: Yes.

(Thereupon the jury retired and exceptions were noted.)

The Court: The plaintiff may note any exceptions.

Mr. Brunner: Plaintiff, if your Honor please, wishes to take exception to the court's refusal to give Instruction No. 9; that is the one as to good faith.

The Court: The Court believes it sufficiently covered the matter in the instructions and the exception will be noted.

Mr. Brunner: Likewise Instruction No. 12, that is the instruction on damages. Also Instruction No. 13, so far as it was given. Your Honor gave the last sentence of Instruction No. 13.

The Court: Yes. All exceptions may be noted and overruled. [56]

Mr. Reagh: The defendant, your Honor, respectfully excepts to the charge of the Court to the jury as a whole, and particularly in the following particulars: First, that from the charge as a whole the jury would be led to believe they were

compelled to bring in a verdict for at least the actual amount of the proven overcharges unless the defense that has been referred to throughout the trial as the Candler defense was established.

The Court: The exception will be noted. I wish to call your attention to the fact that that instruction was favorable to the defendant, because under the language of the statute \$25 could be awarded for every overcharge; if I had instructed the jury they could do that the verdict could be very much larger than the actual overcharges in this case.

Mr. Reagh: The defendant further excepts to that portion of the Court's charge concerning the pre-trial order and the failure of the defendant to point to any item in Exhibit No. 1 constitutes any admission whatsoever on the part of the defendant. Further, the defendant excepts to the charge of the Court concerning the pre-trial order from which the jury would be authorized to infer that from the court's instructions as to the pre-trial order that any money was ever received by defendant on any of the transactions set forth in Exhibit 1, or that any consideration ever passed to the defendant as a result of any of the transactions set forth in Exhibit 1, or that any meat, whatsoever, was delivered to any person in Exhibit 1, or that [57] any of the purchases in Exhibit 1 was made, or that the failure of the defendant to point out grades in Exhibit 1 indicated an admission on his part that any particular person therein listed was himself unable to have brought the

action, in whose behalf the Administrator proceeds. May I have an exception?

The Court: You are arguing the matter now. The exception may be noted.

Mr. Reagh: The defendant further excepts to the statement of the court's opinion that an overcharge in the sum of \$4134.07, or any other overcharge, was proved by Exhibit 1.

The Court: You may have an exception.

Mr. Reagh: Further, the defendant excepts to that portion of your Honor's charge which in effect told the jury that under this particular law the defendant was bound by the acts of his agent.

The Court: You may have an exception.

Mr. Reagh: The defendant further excepts to that portion of the Court's charge in which the Court stated in effect that it was the duty, absolute duty of the defendant to conduct its business in accordance with the price regulations.

The Court: You may have an exception.

Mr. Reagh: The defendant excepts to the failure of the Court to instruct the jury that it was incumbent upon the plaintiff to prove that the defendant had received money or consideration for the sale of meat described and set forth in Exhibit [58] No. 1, and the failure of the court to instruct the jury that it was incumbent upon the plaintiff to prove the purchases in the course of the transactions.

The defendant further respectfully excepts to the Court's refusal to charge that the presumption of innocence applies to the defendant.

The defendant further excepts to the Court's refusal to charge the jury that the law presumes honesty and fair dealing in transactions in complying with the law.

The defendant also excepts to the Court's refusal to give proposed instruction No. 15 and proposed instruction Nos. 16 and 17.

The Court: You have already covered that. All of the exceptions are noted and overruled. Bring the jury back.

(Thereupon the jury was returned into court.)

The Court: Let the record show that all of the jurors are present.

Ladies and Gentlemen of the Jury: The Court has concluded its instructions to you.

The clerk has prepared forms of verdict for you, merely for your convenience. Let me say to you, because these forms have been prepared does not mean that you are to render a verdict one way or the other as indicated by the form of the verdict. These forms are merely provided for your convenience, for you to fill out when you have arrived at a verdict. You may take [59] the exhibits with you to the jury room as well as the forms of verdict for your convenience.

The jury may now retire and deliberate upon your verdict.

(Thereupon the jury retired and thereafter returned into court with a verdict in favor of the plaintiff in the sum of \$4,634.07.)

[Endorsed]: No. 11034. United States Circuit Court of Appeals for the Ninth Circuit. A. N. McDonald, Appellant, vs. Chester Bowles, Administrator, Office of Price Administration, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the Northern District of California, Southern Division.

Filed April 11, 1945.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

In the United States Circuit Court of Appeals
for the Ninth Circuit

No. 11,034

A. N. McDONALD,

Appellant,

v.

CHESTER BOWLES, Administrator, etc.,

Appellee.

STATEMENT OF POINTS RELIED ON BY
APPELLANT AND DESIGNATION OF
RECORD.

On this appeal the appellant will rely on the following points:

1. There was no evidence of any sale by the defendant; nor any evidence to support any claim

for damages resulting from any sale of provisions by the defendant.

2. There was no evidence to warrant the issuance of any injunction.

3. The pre-trial order infringed the defendant's rights under the VIth and XVIth Amendments of the Constitution of the United States.

4. The court erred in admitting Plaintiff's Exhibit 1 into evidence.

5. The court erred in denying the defendant's motion for a directed verdict at the close of the case.

6. The court erred in charging the jury, as pointed out in the defendant's exceptions.

7. The court erred in failing to charge the jury, as pointed out in the defendant's exceptions.

8. The court erred in denying defendant's motion for judgment notwithstanding verdict.

9. The court erred in denying defendant's motion for a new trial.

Properly to present the above points the appellant designates the entire transcript, except Plaintiff's Exhibit 1, as necessary to be printed herein.

CHARLES REAGH,
Attorney for Appellant.

The receipt of a copy of the above and foregoing Statement and Designation is hereby acknowledged, this 20th day of April, 1945.

W. H. BRUNNER,
JOSEPH E. TINNEY,
Attorneys for Appellee.

[Endorsed]: Filed Apr. 20, 1945. Paul P. O'Brien, Clerk.

[Title of Circuit Court of Appeals and Cause.]

STIPULATION CONCERNING EXHIBIT
No. ONE

It is hereby stipulated that the Clerk of this Court need not print Plaintiff's Exhibit No. 1, in the court below, but that the same may be considered by this court to the same extent as though it had been so printed.

CHARLES REAGH,
Attorney for Appellant.
W. H. BRUNNER,
JOSEPH E. TINNEY,
Attorneys for Appellee.

[Endorsed]: Filed Apr. 20, 1945. Paul P. O'Brien, Clerk.

[Title of Circuit Court of Appeals and Cause.]

ORDER CONCERNING PRINTING
OF TRANSCRIPT.

The parties hereto having by stipulation so agreed, it is now by the court

Ordered: That in printing the transcript herein the Clerk omit Exhibit No. 1 in the court below, but that the said exhibit may be considered by the court on this appeal as fully as though printed.

Dated: April 26, 1945.

CURTIS D. WILBUR,

Senior U. S. Circuit Judge.

[Endorsed]: Filed Apr. 26, 1945. Paul P. O'Brien, Clerk.